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In the Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR W. STIGILE AND ELLEN BALIS, PETITIONERS

v.

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

19 pp

QUESTION PRESENTED

Whether random drug testing of employees who hold permanent passes allowing them special access to the Old Executive Office Building, which is within the security perimeter of the White House, is reasonable under the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 110 F.3d 801. The opinion of the district court (Pet. App. A20-A26) is reported at 932 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1997. (Pet. App. A32.) The petition for rehearing was denied on August 21, 1997. The petition for a writ of certiorari was filed on November 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Old Executive Office Building (OEOB) is located inside the White House security perimeter, which is marked by a contiguous fence and is closed off to the public. The only other building located within the security perimeter is the Executive Mansion, which includes the East and West Wings of the White House. The grounds of the OEOB are a few yards away from the West Wing, and there is no physical barrier between the two buildings. C.A. J.A. 4.[1] The OEOB offers close, direct vantage points from which to observe the West Wing, the Executive Mansion, and the President's and Vice President's common routes of travel. The Vice President has an office in the OEOB, and the President and Vice President frequently visit the building for meetings and other purposes. Pet. App. A3.

Access to the OEOB is tightly restricted. Individuals who do not hold permanent OEOB or White House passes may enter the building only if they are invited by a White House or OEOB passholder, and only after they are cleared for entry by the WAVES (Worker and Visitor Entrance System) Center. See Pet. App. A3. Non-passholder visitors must also present photo identification to a Secret Service officer at the OEOB entrance and wait for the officer to verify their clearance. By contrast, White House and OEOB passholders may enter the OEOB without an invitation, are not processed through the WAVES Center, and are not required either to present a photo identification or to wait for the Secret Service to verify

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[1] "C.A. J.A." refers to the joint appendix filed under seal in the court of appeals. "C.A. Pub. J.A." refers to the separate, publicly filed joint appendix.

their clearance. Those special privileges allow White House and OEOB passholders to enter the building for meetings without having to wait in line at the entrance. See C.A. J.A. 17, 58.

2. Executive Order 12,564 directs the head of each executive agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions." 51 Fed. Reg. 32,889, 32,890 (1986). Pursuant to that Executive Order, the Executive Office of the President (EOP) issued its Drug-Free Workplace Plan in July 1988, and amended the plan in 1992. The EOP plan mandates, *inter alia*, random testing of employees who hold sensitive positions. See C.A. Pub. J.A. 62.

After several serious security incidents at the White House complex in 1994, see C.A. J.A. 3, the Office of Management and Budget (OMB)—an agency within the EOP—took a fresh look at its drug testing program and, after careful deliberation, decided to issue 30-day random testing notices to all its OEOB passholders. Gov't C.A. Br. 14-15.[2] A drug-using OEOB passholder is in a unique position to harm the President or Vice President. First, OEOB passholders could themselves harm the President or Vice President inside the White House security perimeter: the President and Vice President visit the OEOB frequently, and security procedures cannot prevent an OEOB passholder from coming within a few feet of the President or Vice President on such a visit. See

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[2] A 30-day notice informs an employee that he will become subject to the possibility of random testing in 30 days. OMB had identified all its OEOB passholders as subject to random drug testing in 1992, but, until 1995, it had issued 30-day notices only to employees hired after 1992. See Pet. App. A4.

C.A. J.A. 2-4, 6. Second, an OEOB passholder could clear into the building a visitor who wishes to harm the President or Vice President. Pet. App. A4.[3] Finally, OEOB passholders could "collect information on the comings and goings of either official for some third party intent on rendering such harm." *Ibid.* Unlike anyone else, OEOB (and White House) passholders have unlimited access to the OEOB 24 hours per day, 365 days per year. They therefore have unique opportunities to collect sensitive information about the President's and Vice President's movements and common routes of travel inside the White House security perimeter. See Pet. App. A3-A4.

3. Petitioners are OMB economists who are subject to the agency's random drug testing program. Their offices are in the New Executive Office Building (NEOB), which is located across Pennsylvania Avenue from the OEOB and lies outside the White House security perimeter. They and other OMB staff in the NEOB have been issued OEOB passes because their jobs require them to visit the OEOB for meetings and other official functions. See Pet. App. A4; see also Pet. 3. Petitioners filed this action in June 1996, obtained a temporary restraining order prohibiting the government from testing them, and moved for a preliminary injunction continuing the TRO. The district court consolidated the preliminary injunction motion with its consideration of the merits. After an evidentiary hearing, at which government security officers provided testimony about the basis for the drug testing program, the court

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[3] Only White House and OEOB passholders have authority to clear visitors into the OEOB. White House passholders are also subject to random drug testing.

granted a permanent injunction barring random testing of both plaintiffs. See Pet. App. A20-A26.

4. The court of appeals reversed. Pet. App. A1-A19. It first observed that urinalysis drug testing is a Fourth Amendment search, and that a court must evaluate the reasonableness of a drug testing program by balancing the need for the program against any reasonable privacy expectations the tested employees may have. Pet. App. A5. Applying that test, the court concluded that the government's purpose in testing OEOB passholders—to protect the President and Vice President in their primary work environment—is of "the utmost importance," *id.* at A6, and that the harm the government seeks to avoid— physical harm to either of those officials—"has the necessary immediate connection to the risk posed by a drug-using employee," *id.* at A10. The court emphasized that OEOB passholders have special access to the OEOB, and that they therefore present greater potential risks to the President's and Vice President's safety than do other visitors to the OEOB, whose access is more limited. *Id.* at A11-A12.

In a separate concurring opinion, Judge Rogers agreed that, "[g]iven the unique access to areas within the White House security perimeter that an [OEOB] pass provides, the court could scarcely avoid concluding that the drug testing program of the [EOP] is reasonably related to the goal of preventing harm to the President and Vice President." Pet. App. A13. She wrote separately to emphasize that the court of appeals' decision was limited by "(1) the need to enable the President and Vice President to do their jobs; (2) the access needs of and consequences for OMB passholders; and (3) the nature of the drug testing program," *id.* at A15, which is "conducted in a

manner that minimizes intrusion into individual privacy," *id.* at A18.

Petitioners filed a petition for rehearing with a suggestion of rehearing in banc, arguing, among other things, that the panel decision conflicts with *Chandler* v. *Miller*, 117 S. Ct. 1295 (1997), which was issued on the same day as that decision. After the court of appeals directed the government to file a response, the panel denied the petition for rehearing, and, with Judge Wald dissenting, the full court denied the suggestion of rehearing in banc. See Pet. App. A28-A30.

DISCUSSION

The court of appeals' opinion is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioners principally argue that the decision below is inconsistent with *Chandler* v. *Miller*, 117 S. Ct. 1295 (1997). See Pet. 13-18, 22-24. We disagree. In *Chandler*, this Court struck down a Georgia statute that required candidates for election to state office to certify that they had taken a drug test and that the result of that test was negative. 117 S. Ct. at 1298. The Court held that the statute violated the Fourth Amendment because it "diminishe[d] personal privacy for a symbol's sake" (*id.* at 1305)—*i.e.*, to protect the State's "image" by demonstrating its generalized resolve to combat drug abuse (*id.* at 1304) —and not to address any actual "concrete danger" (*id.* at 1303). The Court emphasized, however, that, "where the risk to public safety *is* substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches

now routine at airports and at entrances to courts and other official buildings." *Id.* at 1305 (emphasis added); see also *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union (NTEU)* v. *Von Raab*, 489 U.S. 656 (1989); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646 (1995).

Unlike *Chandler*, this case does involve a "substantial and real" threat to safety: the safety of the President and the Vice President. As the court of appeals concluded (Pet. App. A4, A10-A12), federal employees who hold permanent passes to the OEOB are uniquely well-positioned to threaten the President and Vice President and to give others the information or entry clearance they may need to jeopardize the lives of those officials. The record amply justifies that conclusion. First, the President and Vice President visit the OEOB frequently, and OEOB passholders themselves commonly come within a few feet of the President and Vice President on those visits. See C.A. J.A. 2-4, 6. Second, OEOB passholders can clear into the OEOB visitors who may be intent on harming the President or Vice President. Although the Secret Service checks to ensure that a visitor's name does not show up on a National Crime Information Center database, see C.A. J.A. 6, 56, there is no other review of the identity and background of visitors cleared into the building by an OEOB passholder, and, except for foreigners, visitors need not be escorted once they are inside. Finally, passholders have continual access to the OEOB, and they have unique access to vantage points from which to learn the President's and Vice President's common routes of travel inside the White

House security perimeter. See Pet. App. A3-A4; C.A. J.A. 6-7.

Those facts confirm that, in *Chandler*'s terms, the drug testing at issue here responds to "substantial and real" threats, 117 S. Ct. at 1305, not merely "symbolic" aspirations.[4] Petitioners are therefore simply incorrect in claiming (*e.g.*, Pet. 13) that there are no "special risks" of harm in this case. To the contrary, this case involves exceptionally important concerns about threats to the safety of the President and Vice President, and it therefore falls squarely within the class of cases in which the courts have consistently upheld reasonable programs of random drug testing. See, *e.g.*, *NTEU* v. *Von Raab*, *supra* (approving suspicionless drug testing of applicants for Customs Service positions because of, *inter alia*, concerns about how drug use could affect employees' use of firearms); *American Federation of Government Employees (AFGE)* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (approving random drug testing of hazardous material inspectors and aircraft mechanics), cert. denied, 495 U.S. 923 (1990); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (approving random drug testing of nuclear power plant employees).

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[4] Petitioners challenge what they allege to be an "alternative holding" by the court of appeals that "this testing was constitutional because of the government's interest in 'assuring the public that it is taking every possible precaution' to protect the President." Pet. 16-17 (quoting Pet. App. A6). The court of appeals, however, made no such "alternative holding." To the contrary, it mentioned the interest in question only to clarify that it was "not asserted in this case," and to avoid "creat[ing] an inadvertent precedent by negative implication." Pet. App. A6.

2. Despite petitioners' apparent contention to the contrary (*e.g.*, Pet. 14), agencies charged with protecting the President and Vice President are "permitted, within reason, to anticipate novel security threats and to act to avert them." *White House Vigil for the ERA Comm.* v. *Clark*, 746 F.2d 1518, 1534 n.107 (D.C. Cir. 1984). "No President was ever killed in a theatre until Lincoln, in a railway station until Garfield, in a reception line until McKinley, or in an open car until Kennedy." *Ibid.* (internal quotation marks omitted). The government is entitled to address such threats before they materialize into actual assassination attempts.

Petitioners further contend (Pet. 14-16), however, that random drug testing of OEOB passholders is unnecessary because, they say, the President and Vice President are adequately protected by the Secret Service and by other existing security measures in the White House complex. But the Constitution does not require the federal courts to fine-tune the proper level of physical protection for the President and Vice President. Instead, as applicable precedent makes clear, the physical safety of those officials is a matter committed to the broad discretion of White House security officials. See *White House Vigil*, 746 F.2d at 1534 (although security measures for sidewalk in front of White House were not the only means available, "[w]e are not at liberty * * * to replace the agency's judgment with our own"); *Sherrill* v. *Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (courts should be "appropriately deferential" to government determinations regarding "what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family").

The drug testing program at issue here is a permissible exercise of that discretion. As discussed above, see pp. 3-4, *supra*, other security measures cannot prevent an OEOB passholder (or someone admitted by that passholder into the OEOB) from coming within a few feet of the President and Vice President inside the White House security perimeter, and no security detail can fully insulate the President or Vice President from physical threats under those conditions. Indeed, Presidents Reagan, Ford, and McKinley were each guarded by Secret Service details when they were fired upon. See, *e.g.*, *United States* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); C.A. Pub. J.A. 353. Moreover, OEOB passholders have continual access to locations from which they can observe the President's and Vice President's principal routes of travel within the White House security perimeter, see pp. 2, 4, *supra*, and existing security measures could not prevent a drug-using OEOB passholder from conveying that information to someone who wishes to harm those individuals.

3. Petitioners separately suggest that the government is unjustified in its concern that an OEOB passholder's use of illegal drugs would increase the risk of harm to the President and Vice President. See, *e.g.*, Pet. 16-17. That argument is without merit. Even apart from the danger that mind-altering drugs could induce a passholder himself to take actions that would jeopardize the safety of those officials, a federal employee's use of such drugs also raises a substantial danger of bribery or blackmail. See Pet. App. A11, A13; see also *Von Raab*, 489 U.S. at 669, 674; *Hartness* v. *Bush*, 919 F.2d 170, 172-173 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991); *NTEU* v. *United States Customs Service*, 27 F.3d 623, 624 (D.C. Cir. 1994);

AFGE Local 1533 v. *Cheney*, 944 F.2d 503, 506 & n.6 (9th Cir. 1991). Although petitioners seek to belittle that concern (see Pet. 17-18), this Court has itself recognized the danger inherent in a drug user's unusual susceptibility to bribery and blackmail. See *Von Raab*, 489 U.S. at 669, 674. Moreover, the Fourth Amendment does not require security officials to wait for the first instance of drug-related bribery or blackmail to occur in this context before they act to prevent the possibility of a drug-related attack on the President or the Vice President. That is why, in *Von Raab*, this Court upheld the constitutionality of suspicionless drug testing of certain Customs Service employees even though the Service's drug testing program "was not implemented in response to any perceived drug problem among Customs employees." *Id.* at 673; see *id.* at 674-675.[5]

4. Petitioners also claim (Pet. 18-21) that the drug testing program at issue here violates the Fourth Amendment because, they contend, there is no "nexus" between the program and a tested employee's job responsibilities. That argument is without merit as well. The Fourth Amendment permits reasonable drug testing of persons whose official employment provides them with special opportunities to do harm to national security or individual safety; that principle is not arbitrarily limited to employees who could cause such harm only within the narrow ambit of

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[5] The Court added that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of illegal drug use. 489 U.S. at 674 (citation omitted). Here, the EOP drug testing program has produced at least six positive results since its inception, see Stigile C.A. Br. 4 n.1, and it may well have deterred other employees from using drugs for fear of detection.

their job descriptions. Thus, in determining the class of employees who may constitutionally be subjected to random drug testing, this Court and other courts have considered not just the specific tasks those employees perform, but also other considerations, such as the access a job provides to sensitive information. See *Von Raab*, 489 U.S. at 677 (compelling interest in protecting truly sensitive information would justify suspicionless drug testing of employees whose jobs give them access to such information); *Hartness* v. *Bush*, 919 F.2d at 171; *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (same), cert. denied, 493 U.S. 1056 (1990). As the court of appeals recognized, the same principle applies where, as here, an employee's job gives him or her access to locations that are highly sensitive for safety-related reasons. See Pet. App. A8-A11; *id.* at A17 (Rogers, J., concurring).[6]

There is likewise no merit to petitioners' contention that the court of appeals' ruling would allow suspicionless drug testing of virtually all federal employees on the theory that almost any federal employee "might at some time be in the vicinity of

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[6] Petitioners suggest that they do not need OEOB passes to do their jobs and that they were issued such passes only to serve "administrative convenience." Pet. 4. That is not so. As the court of appeals noted, "[m]any of the OMB's senior staff have offices in the OEOB," and OMB employees such as petitioners are issued OEOB passes "because of their frequent need to visit the building for meetings with their supervisors." Pet. App. A3. Petitioners' passes allow them to enter the building without having to undergo various time-consuming procedures that apply to visitors who do not hold OEOB or White House passes. See pp. 2-3, *supra*. That ability to enter the OEOB quickly is thus an important job-related requirement. See Gov't C.A. Br. 7; Pet. App. A4, A17.

* * * [the President or Vice President]." Pet. 22. OMB designated its OEOB pass holders for random testing because their jobs require them to have *special* access to the White House security perimeter, within which the President and Vice President need to move about freely to conduct the affairs of state. Federal employees whose jobs do not require that kind of special access are not covered by the court of appeals' decision. See Pet. App. A3-A4, A11-A12; *id.* at A16-A19 (Rogers, J., concurring); see also *Harmon*, 878 F.2d at 490 (holding that Fourth Amendment prohibits random testing of all federal employees).

Petitioners are also mistaken in contending (see Pet. 20-21) that this drug testing program is unconstitutionally *under*inclusive because the government does not require random drug testing of (for example) volunteers or short-term interns. Because permanent OEOB passholders have special authorization to invite vistors inside the White House security perimeter, and because they have long-term access to areas where the President and Vice President work, they pose a greater potential risk to the safety of those officials. See Pet. App. A12 (majority opinion); Pet. App. A16-A17 (Rogers, J., concurring); see generally pp. 2-3, *supra* (discussing special privileges of permanent passholders). That the White House has narrowly tailored its random testing program to include only those employees who have special access to the OEOB does not somehow undermine the constitutionality of that program; instead, it confirms the program's reasonableness.

5. Finally, petitioners contend that the court of appeals failed to balance the government's compelling interest in ensuring the safety of the President and

Vice President against the passholders' reasonable expectations of privacy. Pet. 23-24. That is incorrect. The court of appeals recognized and correctly applied the Fourth Amendment balancing test that governs employee drug testing programs. See Pet. App. A7; see also Pet. App. 18 (Rogers, J., concurring). The court held that, in this particular setting, the government's exceptional interest in protecting the President and Vice President from assassination justifies a drug testing program covering employees who have unusual access to the areas in which the President and Vice President work. See Pet. App. A11. That holding is sound, and it does not conflict with the decisions of this Court or any other court.

Moreover, the court of appeals identified a number of factors that substantially mitigate any privacy-related concerns petitioners may have. The court observed, for example, that the federal regulations governing the EOP's testing program "minimize the [program's] intrusion" on petitioners' reasonable privacy interests, and that petitioners' expectation of privacy "is lessened because they occupy positions that require stringent background checks." Pet. App. A7. Likewise, "[u]nder mandatory guidelines, EOP employees who are selected for random drug testing are permitted to provide urine samples in a rest room stall or similar enclosure," and "[a]lthough a monitor of the same gender may be present, the monitor is not permitted to observe the employee producing the sample unless there is reason to believe the employee will alter or substitute the urine specimen." Pet. App. A18 (Rogers, J., concurring). Those considerations, which were also present in *Von Raab* and *Skinner*, substantially "minimize the intrusiveness

of the . . . drug-screening program." *Ibid.* (quoting *Von Raab*, 489 U.S. at 672 n.2).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
LOWELL V. STURGILL JR.
Attorneys

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[7] In two footnotes, petitioners suggest that further review is necessary because the district court "consolidat[ed] their motion for preliminary injunction with the merits" and thereby allegedly deprived them of an opportunity for full discovery. Pet. 7 n.1; see also Pet. 27 n.8. This Court does not typically grant certiorari to review that kind of discovery dispute, however, and petitioners have failed to make any specific showing that a remand to the district court would produce additional facts relevant to this case. See *Bastin* v. *Federal Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (no right to additional discovery where party seeking discovery offers nothing but "rank speculation" to support requests). In any event, petitioners did not adequately present that argument to the panel. In their brief on the merits, they relegated the issue to a single footnote, in which they claimed only that the court of appeals should remand "to the extent this Court determines that additional facts are necessary in order to affirm the District Court's decision." Stigile C.A. Br. 12-13 n.6. The footnote did not identify any "additional facts" that discovery might reveal.